Baja's Place, Inc. *and* Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO. Case 7–CA–18656

August 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On April 6, 1982, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Baja's Place, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Marilyn Drean on December 12, 1980, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT threaten employees with closure of our business if they choose to be represented by Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, or any other labor organization.

WE WILL NOT create the impression of unlawful surveillance of our employees' union activities.

WE WILL NOT discourage you from membership in or activities on behalf of Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, or any other labor organization, by discharging or otherwise discriminating against you in any manner in regard to your rates of pay, wages, hours of employment, hire, or tenure of employment or any term or condition of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL offer Marilyn Drean immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any reference to Marilyn Drean's discharge, and to notify her in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against her. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Member Jenkins would compute interest on Drean's backpay in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of our discrimination against her, with interest.

WE WILL expunge from our files any references to the disciplinary discharge of Marilyn Drean on December 12, 1980, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

BAJA'S PLACE, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard at Detroit, Michigan, on November 18 and 19, 1981. The charge was filed on December 16, 1980, by Hotel, Motel, Restaurant Employees, Cooks and Bartenders International Union, AFL-CIO, herein called the Union, against Baja's Place, Inc., herein called Respondent. The complaint was issued on January 22, 1981, and alleges that Respondent violated Section 8(a)(1) and (3) of the Act by the discharge of employee Marilyn Drean, and by other conduct violative of Section 8(a)(1) of the Act.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent filed post-hearing briefs.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Michigan corporation with its only office and place of business located at 23955 Michigan Avenue, Dearborn, Michigan, is engaged in the retail operation of serving food and alcoholic beverages as a public restaurant, and meets the appropriate jurisdictional standards required by the Board for an appropriate period of time. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's president and chief executive officer is John Baja who operated a restaurant on the same leased premises from 1959 to 1969. After a period of operation under the name of "Sun Dog," by a well-known Detroit restaurateur, the premises succeeded to the control of Respondent which opened its business in August or September 1980. At the reopening Respondent hired, chiefly through Assistant Manager Sue Zukovich, 30 waitresses on 2 shifts. Subsequent business demonstrated that Respondent was overstaffed and the number of waitresses was reduced ultimately to 12. In addition to John Baja, Respondent maintained a manager, Jack Panzer, a day-shift chief cook Craig Brown, a night-shift cook, and kitchen employees of whom three were on the day shift, a second cook, a pantryperson, a dishwasher, and a storeroom and food preparation person. A similar kitchen crew served the night shift. During peak seasons, i.e., Christmas or on busy days when private parties were scheduled, a second dishwasher was added.

The General Counsel alleges that Craig Brown, who was employed as head cook until he quit in the summer of 1981, was a supervisor within the meaning of the Act. Respondent contends that Brown, as head cook, merely exercised routine, repetitive direction of the kitchen staff and was therefore not engaged in such exercise of responsible judgment and discretion as to qualify him as a supervisor. Brown's direction of the kitchen staff, indeed, was routine in nature.[1] However, he was responsible for work in the kitchen, i.e., the quality of food preparation, and consulted with Baja as to this objective. He was also responsible for the procurement and maintenance of supplies. His chief supervisory discretion was exercised in the hiring of kitchen personnel. Because of the high degree of turnover, Brown was solely responsible for the hiring of dishwashers. As to other kitchen personnel, on occasion he resorted to Respondent's office file of written job applications. After he filtered out applicants who in his judgment were deficient in experience, he recommended to John Baja certain applicants and Baja, without conducting his own independent investigation, accepted the recommendation and authorized Brown to hire the new person.

The record does not clearly reveal that any kitchen person was discharged or reprimanded during Brown's tenure. In addition to the daily repetitive tasks, Brown instructed his employees when and where to clean the facilities. Thus he could assign a person cleaning duties rather than food preparation. He consulted with John Baja in determining the work schedule of kitchen employees. In that process he would inform Baja of what area needed a particular person, at a specific time. Baja accepted or rejected these recommendations and thereafter Brown composed and posted a schedule. Upon occasions when the kitchen staff unexpectedly was shorthanded, Brown, upon his own initiative and judgment, communicated with off-duty employees and asked them to report to work.

[1] My findings are based essentially on the testimony of Craig Brown, Respondent's witness who appeared credible, forthright, and certain in his testimony regarding his job duties as chief cook. Where it conflicts in certain areas with that of John Baja, as to supervisory indicia, I credit Brown. I also credit the testimony of employee witnesses adduced by the General Counsel, whose testimony was virtually uncontradicted as to Brown's authority.

John Barbee was hired by Brown as a dishwasher. One month later, Brown asked him whether he desired to move up the kitchen job classification scale to the next step of stock and food preparation person. Upon an affirmative response, he was immmediately assigned by Brown to the job of stock and food preparation person.

Although Panzer and Baja were to be seen passing through the kitchen, there is no evidence that either of them became directly involved in the details of running the kitchen or supervising the personnel therein. Although the night cook directed the work of the night-shift kitchen employees, much of the night-shift food was prepared in advance by Brown. The night-shift cook, unlike Brown, did not meet and consult with Baja, and there is no evidence that the night-shift cook hired or promoted any employee. Thus, Respondent conferred Brown with the appearances of managerial authority, as he appeared to be the chief conduit of managerial decisions to all kitchen employees; i.e., hiring, promoting, calling in employees for extra duty when shorthanded, posting the schedule, participating in managerial meetings, etc.

I conclude that the General Counsel has adduced sufficient evidence to establish the supervisory status of Brown.

Marilyn Drean was one of several witnesses who had previously been employed at the Sun Dog and who were hired to work for Respondent upon its commencement of business. The employees of the Sun Dog were represented by the Union as had been the employees of the restaurant previously operated by Baja at that location. Drean had been a union member at the Sun Dog. There is no evidence of past union animus of Baja in the operation of the predecessor restaurant, or in the hiring of employees for the new operation. Most of the hiring, however, was done by Assistant Manager Sue Zukovich.

Saturday, November 22, 1980, proved to be a fateful day for several persons employed at Respondent's restaurant. Employees were advised in a meeting of employees held by John Baja of the retrenchment of certain promised benefits. Assistant Manager Sue Zukovich was discharged on that date. Drean learned of Zukovich's discharge on Monday, November 24. She was to tell John Baja later that the employees perceived Zukovich's discharge as a threat to their own security as Zukovich was considered by the employees to be a hard worker, and also that Drean herself considered Panzer's managerial abilities to be deficient. According to Drean, she and 20 or 30 other employees in groups of 4 or 5 persons, at the nearby Kernin Steakhouse Restaurant, engaged in union representation discussions several times a week commencing on November 22. Kernin's was a favorite afterhours gathering place of Respondent's employees. Robin Ross, who was employed as a waitress at Respondent's restaurant from the opening until February 14, 1981, testified that she also engaged in union discussions with a "few" of her coworkers, including Drean, on about four occasions at Kernin's Steakhouse which commenced in September and continued in October and November. Her testimony therefore conflicts with Drean as to the commencement of union discussions, and thus detracts somewhat from the impactive nature of the November 22 events. However, Respondent conceded Drean's union activities.

L. E. Martin, a witness called by Respondent and one of Respondent's regular customers, testified that late in the evening of Monday, November 24, after returning from a 3-week trip, she patronized the restaurant and experienced the following encounter with Drean who had worked earlier and who had greeted her off duty prior to midnight. At or about 1:15 a.m., Drean had departed and returned later in the evening. Drean approached the bar where Martin was located, staggered, stumbled, and fell against chairs, screamed at Martin with profanity, and accused her of an explicable betrayal of her friendship and an interference in her affairs. Martin, who had known Drean from her patronage at Respondent's restaurant and at other restaurants where Drean had worked, concluded that Drean was intoxicated and walked with her to the outside lot where she attempted to dissuade Drean from driving her own car and offered to drive her home. Drean refused and drove off at or about 2:45 a.m. The next day, i.e., November 25, Martin complained to John Baja about the incident. Manager Panzer testified in vague and generalized terms that he had observed Drean create scenes in the restaurants on two occasions, the first of which involved Martin. Panzer testified that on the first occasion he observed Drean acting and talking "out of character" and moving about uncontrollably and loudly criticizing the restaurant's food, its kitchen operations, and its management in a "blur of statements." Panzer conceded that it was difficult for him to segregate his own recollection from what others had told him had occurred. However, he testified that Martin and he walked Drean out of the restaurant and Martin offered a ride home to Drean. In her testimony, Martin made no reference to Panzer's participation in the incident.Drean denied the foregoing conduct of November 24–25 attributed to her by Martin. She at first denied that any argument had occurred between herself and Martin, but later testified that she did have a confrontation or "words" with Martin, not on November 24–25 but sometime earlier when Zukovich was still employed. Drean testified that on this earlier occasion she had appeared in Respondent's parking lot after 2 a.m. with Zukovich's husband where they attempted to locate Zukovich. However, when Drean encountered a locked rear door to the restaurant she tried to rouse someone within by knocking on the door. According to Drean, this raised the concern of Martin who happened to be the only person in the lot at the time and who questioned her conduct by stating, "What are you guys doing?" After Drean explained, Martin purportedly stated, "Do you know I have control over your job and I can tell Mr. Baja you are knocking on his door after hours and making a scene." When Drean said "no," Martin then asked, "Don't you give a damn about your job?" Drean testified that she responded, "Frankly, no."

There is no evidence that Martin is anything more than a regular patron at the restaurant with whom Baja regularly converses as he does with other customers, and apparently she is favored with the unusual convenience of being served fresh strawberries with her usual bever-

age, and for whom a turkey was once prepared in the restaurant kitchen. Assuming that Martin is a favored customer, there is nothing adduced by the cross-examination or other testimony upon which I can conclude that Martin is obliged to Respondent in any way so as to maintain a strong bias in favor of Respondent. On the contrary, Respondent appears to be indebted to her for regular patronage. Thus Martin appears to have no interest in the outcome of this proceeding, and I must consider her to be an indifferent and therefore credible witness as I find nothing debilitating inherent in her testimony or in her demeanor as a witness. I therefore credit her testimony as to the conduct of Drean in the early morning hours of November 25, which conduct appeared to be that of a person in an agitated, unruly, and intoxicated condition, and that Martin subsequently complained of such conduct to Baja. I also credit Panzer's testimony to the effect that he observed Drean's conduct of November 24–25, and that thereafter retained in his mind an impression that Drean had complained about conditions in the restaurant, including the management and the operation of it.

Drean testified that she had learned of Zukovich's discharge on November 24 and that accordingly she telephoned union agent Dennis Tap, on November 25 between 10 and 11 a.m. (Tap had represented the Sun Dog employees.) She advised Tap that the employees desired to know more about union representation and invited him to address the employees at a meeting at her home. Accordingly, at 2 p.m. on November 25, Tap visited Drean's house and remained for 2-1/2 hours where, he testified, he spoke to 12 or 13 employees in small groups spaced throughout that time as they came and departed at different times. Tap obtained 12 signed union authorization cards. In the evening Drean called and told Tap that she had obtained 19 more signed union authorizations. On the morning of November 26, Tap retrieved those cards from Drean at her house, and later in the day filed a representation petition with the Board, as well as with the Michigan Employment Relations Commission. At 5 p.m., Tap hand-delivered to Manager Panzer a letter addressed to John Baja wherein the Union claimed majority status and demanded recognition.

Drean testified that she engaged in a conversation with John Baja at the bar in Kernin's Steakhouse between 10 and 11 p.m., sometime between November 26 and December 5. She was very uncertain about the date. Baja, however, with a high degree of certitude, recalled the encounter and placed the date in relationship to the discharge of Zukovich, the discharge of Drean, and Thanksgiving Day, as occurring on Wednesday, a week before Drean's discharge.[2] I conclude that the encounter did occur on December 3. According to Drean and Ross, they had never seen Baja at Kernin's Steakhouse. According to Baja, he often stops there on his way to his home which is located two blocks away. According to Drean, after a casual encounter near or at the bar which arose as Drean was passing Baja, who was seated and who had greeted her, the two exchanged pleasantries. Then Baja asked Drean whether she knew anything about the "union getting involved in his establishment." When Drean denied such knowledge, Baja purportedly asked her if she knew what were the employees' complaints or what was wrong with the way the restaurant was run. Drean testified that she responded that, without Zukovich, Panzer was not running the "front of the house" as well and that the waitresses felt insecure of their positions because Zukovich, who was a good worker, nevertheless, was discharged. To that Baja allegedly responded that if the Union were to come in he would be forced to close the restaurant. The conversation lasted, according to her, 15 minutes and, although there were other customers, there were none immediately nearby.

Baja testified that the December 3 conversation with Drean occurred between 11:30 p.m. and midnight and was initiated by Drean after he had entered, walked three-fourths of the way along the bar, noticed an acquaintance at a point beyond, and was about to walk toward that person. According to Baja, Drean, with drink in hand, approached him and stopped him in the aisle and commenced a conversation described as follows. After a few brief irrelevant comments, Drean stated that she wished to talk about problems at Respondent's restaurant, i.e., it was operated improperly by Panzer whom she characterized as a "jerk," that Zukovich should not have been terminated, that she (Drean) found her job desirable, that she (Drean) was on Baja's "side" and "not part of this union bit or nothing." Baja declined to discuss the Union, and testified that he had already received notification of the Union's demand for recognition and election and had obtained legal advice. According to Baja, Drean persisted and stated, "I haven't even signed a card." Baja testified that he told her that it was fine but it was her own decision. He testified that he also told her that he approved of Panzer despite his failings and that he kept trying unsuccessfully to back away from her. Finally, he abruptly terminated the conversation and proceeded to visit with another person at the bar. According to both Baja and Drean, there appear to have been no witnesses within hearing range of this encounter although Baja recognized one of his bartenders and an excook as customers at the bar. They did not testify. Baja testified that Drean told him upon inquiry during the encounter that she had been drinking a "stinger," and that she appeared to be intoxicated. Drean denied having had a "stinger" in hand, that she had discussed certain specific complaints regarding Panzer attributed to her by Baja relating to sizzler steaks, that she had stated explicitly that she was not involved in the union activities, that Baja had attempted to "pull away" from her, i.e., he was seated, and that she was intoxicated.

Waitress Ross testified as to a conversation with Brown which she placed at an unknown date after the union cards were signed but prior to Drean's discharge. The conversation occurred at a point between the bar area and the kitchen entrance. Ross testified that, while they were alone, Brown asked her whether she knew

[2] Baja testified that he had already received a copy of the union petition filed with the Board and had obtained legal advice prior to this conversation.

anything about the Union. She responded that she did not know much and that Brown then stated that John Baja would close the restaurant if the Union "came through," and that he enjoyed his job and that he was well paid. Brown testified that he did have a conversation with one employee in that area and, within that conversation, the context of which he cannot recall, he did tell the employee that the restaurant could not "put up with the burden of having a union . . . ." He could not recall what initiated the conversation but that, after he made his comment, the employee appeared "dumbfounded." In light of Brown's testimony and his inability to explicitly deny the balance of the conversation attributed to him, I credit Ross. Brown testified that he had made these remarks without having had any prior conversation with John Baja relative to the unions and that his comments were his own opinion. He did not, however, tell the employee that his remarks were merely his own opinion.

Drean testified that she engaged in a conversation alone with Brown at some time during the first week of December in the kitchen of the restaurant wherein Brown approached her and told her that he had heard that she was the "ringleader" of the "whole union controversy," and that she responded with a denial, and that he nevertheless persisted in asking her what were the employees' complaints. Drean thereupon told him that the employees desired job security and better fringe benefits, according to what she had heard from the "grapevine." She added that Brown then stated that Baja would be forced to close if the Union were successful. Brown testified that other than the previously described conversation, and another on or about the day of the subsequent Board-conducted election concerning the election (not alleged violative nor as evidence of animus), he could recall no other conversations. As his demeanor was uncertain and as he did not explicitly deny the aforesaid conversation with Drean, I credit her testimony.

Subsequently, Drean was discharged purportedly for her off-duty conduct in Respondent's restaurant on the evening of December 11. With respect to this incident, the General Counsel adduced the testimony of Drean, Ross, and nonemployee Debra Celski. Respondent adduced the testimony of Baja, Panzer, bartender Gary Wood, and Brown.

On the evening of December 11, Brown worked past his day-shift hours and joined Baja at the bar near the kitchen entrance, according to Baja to discuss "problems" in the kitchen. Drean, who was off duty, had taken her friend and neighbor, Celski, out to celebrate Celski's birthday. Celski testified that she and Drean customarily went "out drinking" three or four times a month. Drean testified that, on the evening of December 11, they had commenced drinking at or about 7:30 p.m. at another restaurant and that she had imbibed two or three scotch and sodas by 9:45 p.m. and that she had a "buzz" on but was not intoxicated. At 9:50 p.m. she and Celski departed the other restaurant. At or about 10 p.m. Drean and Celski arrived at Respondent's restaurant. Baja testified that Drean and Celski entered and procured the table along the metal railway that was adjacent to the bar about 10 feet away. Brown, Wood, and Baja testified that Drean came over to talk to Baja. Brown testified that Drean greeted Baja in a tone of voice that indicated "just a little like she was very, very happy or something," and that her words "eventually" began to slur "a little bit." Baja, Brown, and Wood, who passed them as he serviced the length of the bar, testified that they concluded that she was intoxicated. Wood and Baja gave no specific foundation for this conclusion. The bar was long enough to accommodate 17 stools. Wood claimed that he could not hear the conversation that ensued, but he testified nevertheless that it was "heated," but he heard no profanity. Brown, who was seated next to Baja, testified that he did not hear the "whole" conversation. Baja testified that Drean initiated the conversation by reiterating the same comments she made to him on December 3, that she also told him that, in the absence of Zukovich, Baja had "lost control" of his operation, that it was now badly run, and that Panzer was a "lousy manager." Baja testified that he then stated, "Will you get the fuck away from me? You've had enough to drink. Just go someplace else, or go back where you came from where you had your drinks." According to Baja, she responded, "What if I don't," and he then threatened to remove her bodily, at which point she returned to her table. At this point Baja's testimony is confused as to how a drink was delivered to Celski at the table, but it is clear that he had ordered waitress Ross not to serve Drean. When Drean had returned to her table, she took Celski's drink and commenced to sip it. Baja testified that, when he observed that, he became enraged, walked over, grabbed the drink from Drean, and asked her to leave. He testified that she suggested that she might not leave whereupon he threatened to remove her bodily, and then urged her companion to remove Drean. He testified that at that point everyone in the restaurant turned to observe. Baja again told Celski to remove Drean and stated that she was embarrassing him. Celski offered to pay for her drink, but Baja told her that she need not pay. At that point he testified that Drean then walked over to the tables of several regular customers, including Tom Flynn and Ed Hughes, two tables away, and started to talk to them. Baja testified that he became "madder than hell," that at that moment Panzer entered the lounge from the "back," and that Baja ordered Panzer to remove that "S.O.B.," i.e., Drean. Panzer then went and nudged Drean away out of the restaurant.

Brown testified cryptically that, after the initial meeting between Drean and Baja at the bar, the next thing that he recalled occurring was that Drean insisted upon having a drink, that she went to a table to obtain a drink, that she got up and started to talk to customers, that he did not hear what she said, and that next "they" removed her from the restaurant. Brown testified that there were 12 customers present, at 3 tables, that a "couple" of loud words were uttered between Baja and Drean which he did not hear although Baja and Drean were talking at a distance of only 4 or 5 feet away. Wood could only recollect in generalized testimony that Drean was asked to leave, that she refused, that words

were exchanged between Baja and Panzer and Drean. When asked whether he saw Drean talking to customers, he testified that he believed that Drean merely sat at one table and only talked to Baja at the bar. Panzer testified that he observed Drean and Celski enter on December 11. However, he gave no account of his vantage point. His testimony seems to conflict with Baja who testified that Panzer entered the lounge at a later point. It is also inconsistent with the foregoing testimony as to the sequence of events. Panzer was also given to generalized and conclusionary testimony, which at times was confused and accompanied by a hesitant and uncertain demeanor. He suggested that Drean's behavior was not as "out of line" as had occurred in the L. E. Martin incident. He testified that Drean and Celski entered the lounge and that Drean then immediately proceeded to talk to other guests wherein she loudly criticized Respondent's owner, the chef, and "possibly" Panzer, that she was thereafter requested several times to leave. He testified that, although he assisted in the process of removing Drean, Baja did not actually request him to do so. He testified that Drean had been told previously not to "be there," i.e., to come into the place. It was not clear who told her that or when or where she had been so instructed. Baja made no reference to any such prior instruction.

According to Drean, she and Celski entered the restaurant and immediately proceeded to a table near the railing adjacent to the bar, and both were seated and remained seated until Ross took their orders and returned with a drink only for Celski. Ross corroborated Drean and Celski and testified further that she, Ross, proceeded to the bar but was instructed by Baja not to serve a drink to Drean. Ross then delivered one drink and told Drean of Baja's order. Only at that point then, according to Drean, Celski, and Ross, did Drean proceed to the bar to talk to Baja.

According to Drean, she went to the bar and asked the reason for Baja's prohibition and was told that she had drunk "too much already," which she denied and that Baja then stated, "I would like you to get out of my mother fucking establishment." Drean testified that she was "shocked and upset" and protested to Baja his use of the obscene language.[3] Baja then repeated his request without the offending adjective. Drean testified that she became "choked up" and walked back to her table, where she disregarded a glass of water on the table and proceeded to "sip" from Celski's alcoholic beverage. As she did so she started to cry. She then, on request, explained to Celski what had happened. Drean testified that it was her intention to leave at that point but that she hesitated in order to get her "bearings." At that moment, she testified, Baja came up and grabbed the drink out of her hand and ordered her to leave immediately, whereupon Celski's offer to pay for the drink was declined by Baja and they thereafter left, unescorted.

Celski, who generally corroborated Drean, testified that she and Drean sat only 5 or 10 feet away from Baja, but that she did not hear any of the conversation between Drean and Baja at any point. She also testified that after Baja grabbed the drink from Drean, the two of them departed. Celski's inability to hear any conversation between Baja and Drean is as curious as Brown's similar testimony, in light of Ross' testimony that from a distance of 18 feet she heard Baja's use of the word "fuck" (but not "mother fuck"), and that Baja was loud enough to have been heard by several waitresses and to have caused customer Flynn to have looked up from his table.

In rebuttal testimony, Drean, Celski, and Ross all testified to Drean's sobriety on December 11, i.e., she did not stumble, fall, or engage in loud or abusive conduct, nor did she address the customers. However, Drean and Celski, in rebuttal, testified that they did not immediately leave when Baja assumed the cost of Celski's drink. They testified that Flynn came to their table and engaged them in a short conversation by asking Drean what had occurred. Despite her testimony as to Drean's sobriety of December 11, Ross testified that, after she told Drean of Baja's prohibition, she, Ross, went to Baja and protested that she had seen other restaurant customers "*more* drunk" and that she could not understand why she should not serve Drean. To that Baja responded that the other intoxicated persons had not been employed by the restaurant. Ross does not explain why she engaged in a discussion of disparate treatment of persons of varying degrees of inebriation if Drean had in fact been completely sober. In any event, Ross corroborated Baja to the effect that at the end of the incident Baja appeared genuinely enraged to the extent that he was physically shaking.

I conclude that Drean, Celski, and Ross testified with greater consistency and certitude than did Baja, Wood, Brown, and Panzer. Although Celski may have been subject to a possible bias as a personal friend of Drean, Ross was not shown to have manifested any bias or animosity toward Respondent that would have seriously jeopardized her credibility. As a former employee, she had nothing to gain by her testimony except the alienation of her former employer and future job reference source although Brown, as a former supervisor, also appeared to have no direct immediate interest in this proceeding except to cultivate a potential job reference source. However, his testimony was too vague and generalized, and failed to corroborate Baja on critical details; e.g., the substance in whole or at least in part of the alleged conversation between Baja and Drean. Had Drean hectored and harangued Baja as he testified, I find it inconceivable that his companion at the bar, Brown, would not have heard and recalled at least part of it. I therefore credit Drean and discredit Baja's account of their conversation of that night. Wood was even more generalized in his testimony and failed to corroborate, if not contradict, testimony as to Drean's alleged conversations with customers. Both Wood and Brown manifested an uncertain demeanor in testimony. Panzer was inconsistent, confused, uncertain, and vague. His testimony contradicts, and is inconsistent with, that of Baja.

I conclude that the events and sequence of events on December 11 occurred as testified to by the witnesses for the General Counsel. However, I also conclude that Drean was not as sober as their testimony suggests. I

[3] Baja vehemently denied the "mother" part of the adjective.

credit Brown's testimony that Drean, who admitted to having a "buzz" on, did give the appearance of being somewhat affected by alcohol in that she slightly slurred her speech and spoke in a slightly altered tone of voice. However, I conclude that she did not behave in a grossly intoxicated manner nor was she unruly, nor did she interfere with Respondent's customers, nor did she cause Respondent any embarrassment by her behavior. I find that any "scene" that was created was that attributed to Baja's heated reaction to Drean's failure to display alacrity in removing herself from the restaurant, e.g., his loud vulgarity, the grabbing of a drink from Drean's hand, the threat to employ physical force, etc.

With respect to the conversation of December 3, I credit Drean in part because of the credibility resolutions concerning the December 11 incident. That is to say, although I have discredited Drean as to the L. E. Martin incident, I found her to be more credible than Baja, in large part due to the corroboration of Celski and Ross in regard to the December 11 events. Additionally, I find it improbable that Drean, who initiated and who largely organized employee support for the Union, would have on two occasions thereafter voluntarily and loudly proclaimed her loyalty to Respondent and her disconnection with the union effort, while she simultaneously criticized the management of the restaurant. I find it more probable that Baja, having recently been made aware of the union activities, seized the opportunity to interrogate an employee concerning the Union within the context of an ostensible, casual social encounter. His conduct, as testified to by Drean, is in accord and concurrent with the conduct of his subordinate chief cook, Brown; i.e., interrogation and threat. Finally, I found Drean's demeanor to have been more certain and to have possessed more of that quality of spontaneity characteristic of candor than the demeanor exhibited by Baja. Thus, I conclude that John Baja did interrogate and threaten Drean on December 3, as testified to by Drean.

IV. ANALYSIS

A. *The 8(a)(1) Allegations*

Based upon the foregoing findings of fact, I conclude that on December 3, 1980, Respondent, by its president John Baja, violated Section 8(a)(1) of the Act by coercively interrogating employee Drean and by threatening closure of the business if the employees chose to be represented by the Union.[4]

I further conclude that Respondent, by its supervisor, Craig Brown, on a date between December 1 and 7, 1980, violated Section 8(a)(1) of the Act by coercively interrogating employee Drean and by threatening closure of the business, and by creating the impression that it had engaged in surveillance of employee union activities by the statement that he had heard that she was the "ringleader" of the union activities. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979).

It is also concluded that Respondent on a date between November 26 and December 11, by Supervisor Craig Brown, violated Section 8(a)(1) of the Act by coercive interrogation of employee Robin Ross, and the threat to close the business if the Union were successful in becoming the employees' designated bargaining agent.

B. *The 8(a)(3) Allegation*

The General Counsel contends that Drean was discharged because of her union activities. Respondent argues that the General Counsel has failed to prove that Respondent was aware of and was hostile to Drean's union activities. Rather, it argues that Drean was discharged for justifiable business reasons; i.e., insubordination. Knowledge of union activity, however, can be inferred from the circumstances; e.g., prevalence of rumors in the plant, size of unit, timing of the discharge, and pretextual nature of the reason proffered for the discharge. *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1969); *Famet, Inc.*, 202 NLRB 409 (1973); *Tayko Industries, Inc.*, 214 NLRB 84, 88 (1974); *The Huntington Hospital, Inc.*, 229 NLRB 253 (1977); *Speed-O-Lith Offset Co., Inc.*, 241 NLRB 928 (1979).

The court stated in *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

The Board in reevaluating the burden of proof in dual motivation cases has recently explicated and announced the following causation test for cases alleging violations of Section 8(a)(3) or violation of Section 8(a)(1) turning upon employer motivation:[5]

> First [the Board] shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case I conclude that there is sufficient credible evidence to infer that Respondent was aware of

[4] Although the issue of threat of closure by Baja was not alleged in the complaint, it was fully litigated at the hearing.

[5] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980).

Drean's union activities prior to her discharge and that it was hostile to those activities.

During the December 3 interrogation of Drean, Baja was exposed to a critique of the restaurant's operations from which it could be reasonably inferred that Drean supported, if not instigated, the union effort. During the first week of December, chief cook Brown revealed his awareness that Drean was the union "ringleader." I find it incredible that Brown, who consulted with Baja on managerial matters, would not have reported this information to Baja.

Finally, as the court of appeals noted in the *Shattuck Denn* case, *supra*, an inference of unlawful motivation can be raised if the proffered reason for discharge is found to be false. As found above, Drean's conduct on December 11 was not unruly or obstreperous. Baja exhibited an exaggerated response to conduct of an off-duty employee that was not shown to have been detrimental to Respondent's business.

Although Drean had engaged in disorderly conduct on the evening of November 24, preceding the union activity, she was not reprimanded for that conduct, and there is no evidence of any concern of either Panzer or Baja being raised for that earlier behavior. Rather, it was silently condoned. However, after Drean had in fact become the "ringleader" of union activities, conduct of far less significance evoked first an order of eviction from the premises and thereafter discharge. From such sequence of events, it can be inferred that Respondent was motivated because of its hostility toward Drean's union activities. I conclude that the General Counsel has sustained the burden of establishing a *prima facie* case of discriminatory discharge for union activities. I conclude that Respondent has failed to adduce sufficient evidence that Drean would have been discharged for misconduct regardless of the existence of an inferred unlawful motivation. The evidence is barren of any evidence that Respondent treated Drean in accordance with past practice or policies regarding employee work or off-work conduct. Nor is there any evidence in the record of past behavior indicative of Respondent's tolerance level of insubordination or lack thereof. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act by coercively interrogating employees regarding their union activities, by threatening employees with closure of its business if they chose to be represented by the Union, and by creating the impression of unlawful surveillance of their union activities.

4. Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Marilyn Drean on December 12, 1980.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice, I recommend that it be required to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Marilyn Drean, it is recommended that Respondent be ordered to offer her immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and to make her whole for any loss of pay she may have suffered by reason of the discrimination against her. Any backpay found to be due shall be computed in accordance with the formula as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Baja's Place, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees regarding their union activities.

(b) Threatening employees with closure of the business if they choose to be represented by the Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, or any other labor organization.

(c) Creating the impression of unlawful surveillance of employees' union activities.

(d) Discouraging membership in or activities of its employees on behalf of Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, or any other labor organization, by discharging them or otherwise discriminating against them in any manner with regard to their rates of pay, wages, hours of employment, hire or tenure of employment, or any term or condition of their employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Marilyn Drean immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her in the manner

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay under this Order.

(c) Post at its place of business in Dearborn, Michigan, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to any alleged violations of the Act not found herein.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."